RECEIVED
Apr 04 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2012-CP-10-00580

Thomas H. Morgan …………………………………………………..………Respondent,

v.

John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, Lauralis Management, Inc., A Texas Corporation, and 150 Bee Street, LLC, A South Carolina Limited Liability Company, Defendants,
Of which John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, and Lauralis Management, Inc., A Texas Corporation are the ………………………………………………………………………………Appellants.

APPELLANTS' PETITION FOR REHEARING

WOMBLE BOND DICKINSON (US) LLP
/s/ Henry E. Grimball____________
Henry E. Grimball, S.C. Bar No. 2313
Morris A. Ellison, S.C. Bar No. 1881
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

Attorneys for Appellants
[Except 150 Bee Street, LLC]

April 4, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT 1

STATEMENT OF THE CASE...1

ARGUMENTS:...5

1. THIS COURT MISAPPREHENDED BOTH THE FACTS OF THIS CASE AND SOUTH CAROLINA LAW WHEN IT HELD THAT "BOTH THE CIRCUIT COURT AND ARBITRATION PANEL HAD SUBJECT MATTER JURISDICTION OVER THIS MATTER 5

   A. FACTS 5

   B. LAW..5

2. THIS COURT MISAPPREHENDED BOTH THE FACTS OF THIS CASE AND SOUTH CAROLINA LAW WHEN IT HELD THAT RESPONDENT MORGAN'S CLAIM WAS NOT BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS...8

   FACTS AND LAW 8

CONCLUSION..12

TABLE OF AUTHORITIES

CASES

*Agostino v. Hicks,*845 A.2d 1110 (Del. Ch. 2004) 6
Bluffton Town Council Election v. Fulgham, 385 S.C. 632, 614 S.E.2d 683 (2009) 7
Coon v. Coon, 364 S.C. 563, 614 S.E.2d 616 (2005) 7
Daniels v. Vann, 396 So.2d 723 (D.Ct.App.Fl. 4th Dist.) (1981) 6
Fitzpatrick v. Shay, 314 Pa. Super 450, 461 A.2d 243 (1983) 6
Gabriel v. Preble, 396 F.3d 10 (1st Cir. 2005) 5
Gillman v. City of Beaufort, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006) 6
Hedgepath v. American Tel. and Tel Co., 348/ S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) 12
Hine v. McCrory, 2023 WL 3994467 (Unpublished Opinion, S.C. Ct. App. 6/14/25) 10, 11
Hunter v. Boyd, 203 S.C. 518, 28 S.E.2d 412 (1943) 7
In re McCoy, 157 B.R. 705 (Bankr. M.D. Fla. 1993) 6, 7
Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000) 7
Koster v. American Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947) 5
Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct.App. 2010) 9
Schuler v. Feder, 184 N.Y.S.2d 933 (Supp. 1959) 6
Smyly v. Smith, 216 Ga. 529, 118 S.E.2d 188 (1961) 6
State v. Bagley, 2022 WL 496800 (Ct.App.Ka. 2/18/22, 503 P.2d 1082) 8

OTHER AUTHORITIES

South Carolina Rule of Civil Procedure 15(c) 7
South Carolina Rule of Civil Procedure 19 6

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

1. Did the Court of Appeals overlook or misapprehend applicable law governing subject matter jurisdiction in this derivative action where the Plaintiff failed to name an indispensable party?

2. Did the Court of Appeals overlook or misapprehend applicable law governing the application of the three-year statute of limitations in this case where the Plaintiff undeniably threatened to file suit against the Appellants more than three years prior to filing the instant proceeding ?

STATEMENT OF THE CASE

(TIMELINE)

The following is an undisputed timeline of the facts of this case.

1) February, 2000 – 150 Bee Street, LLC, (the "**Company**") was organized and acquired the property located at 150 Bee Street at its intersection with Lockwood Blvd in Charleston (the "**Property**")

2) February/March, 2005 -- The Company's members adopted a Second Amended and Restated Operating Agreement, which has remained in place. (the "**150 Bee Street, LLC Second Amended Operating Agreement**") (R. pp. 882-913)

As of February, 2005, the four (4) members of the Company and their percentages of ownership were:

Neal Baker ("**Baker**")………………………………… 26.67%

Bella Vista……………………………………………..26.67%

Thomas Morgan ("**Morgan**") [Plaintiff/Respondent]….26.66%

Edwin Pearlstine ("**Pearlstine**")………………………. 20.00%

Defendants John Gilbert ("**Gilbert**") and Stuart Fred ("**Fred**") were the principals in Defendant Bella Vista.

Until Baker's death in August, 2011, Baker and Fred of Bella Vista were the Company's Managing Members, collectively owning 53.34% of the Company membership interests. They could therefore exercise "**Majority Consent**" as defined in the Second Amended Operating Agreement.

The Company's purpose was to construct a residential building on the Property.

3) March/April, 2005 – Construction of the building began.

4) April, 2007 – Morgan became increasingly concerned about how Fred and Baker, who was Morgan's brother-in-law, were managing the Company as well as concerned about the possibility of an economic downturn. (Morgan Tr. pp. 520-522) (R. pp. 834-836)

5) April 27, 2007 – Morgan emailed Fred: "Please address your comments to my lawyer from this point forward. I will no longer communicate with you or your staff. …From now on you can deal through my lawyer! Mr. Joel Goldman." (R. p. 923). Within days, Goldman and the Company's general counsel, John Hagerty, exchanged letters. (Hagerty to Goldman, 4/30/07) (R. p. 925); (Goldman to Hagerty, 5/15/07) (R. p. 927)

6) July 6, 2008 – Morgan emailed all other Company members:

"I am turning all my correspondence on this project over to my lawyer and accountants. Stewart [sic., "Stuart"], you have stolen too much money from us. There is no way we have spent $450,000 on travel expenses. I am tired of all your

theft and bullshit. Don't ever contact me again. I am going to sue your ass and get our money back." (R. p. 951)

Morgan had in fact involved his accountant, Rich Merg, in May, 2008, to begin investigating the Company's financial records. (R. p. 947)

7) August 23, 2008 -- Morgan emailed Company Managing Member Baker (R. pp. 959-960):

> "The only reason I don't plan to sue John and Stuart is that I don't want to involve you in the middle of this."

All three of these emails from Morgan were undeniably sent by him well beyond three (3) years before he finally filed the instant suit on January 26, 2012.

8) July 13, 2011 – Morgan retained new counsel, Chris Staubes of Clawson and Staubes of Mt. Pleasant, SC.

9) August, 2011 -- Baker died. His interest became non-voting, and Morgan, with the involvement and vote of Pearlstine, could control the Company. (Morgan Tr. 374) (R. pp. 829-833)

10) December 7, 2011 -- Defendants agreed to a tolling agreement (R. pp. 964-969) drafted by Morgan's counsel. Morgan's counsel drafted the Tolling Agreement (the "**Tolling Agreement**") with a Court of Common Pleas caption showing Morgan as plaintiff and naming multiple defendants, including 150 Bee Street, LLC, Gilbert, and Fred. It was signed by Morgan in his individual capacity and by Henry E. Grimball as attorney for all of the "defendant" parties named in the caption except 150 Bee Street, LLC.

11) January 26, 2012 – The Tolling Agreement having expired 10 days earlier, Morgan filed his **verified** Complaint in this case (the 2012 "**Original Complaint**") (R. pp. 139-163).

The case caption is identical to that in the Tolling Agreement except that the case caption of the Summons and of the Complaint as well as the text of the Complaint did not name 150 Bee Street, LLC as a party plaintiff or defendant. No affidavit of service of the Complaint on 150 Bee Street, LLC was ever filed with the Clerk of Court as required by Rule 4(g), SCRCP.

[It is undeniable that Morgan at that time did not include 150 Bee Street, LLC as a party in his derivative suit.]

12) March 13, 2012 -- Defendants served their Answer, which in paragraph 79 expressly asserted "this Court lacks subject matter jurisdiction." (R. pp. 164-178)

13) July 9, 2012 – By order of Judge Thomas L. Hughston and with the consent of the parties, this case was sent to arbitration as required by the Company's Second Amended Operating Agreement. (R. pp. 6-9) The Order expressly provided that the Court retained jurisdiction to enforce it and to enter any Order it found appropriate. The parties entered the arbitration process based on their pre-July 2012 pleadings (Order of Judge Hughston 7/9/12).

14) February 26, 2018 – More than six (6) years after Morgan filed the 2012 Original Complaint on January 26, 2012, Morgan filed a motion with the Arbitration Panel (the "**Panel**") to amend his January 26, 2012, Original Complaint to name 150 Bee Street, LLC as a party. (R. pp. 381-417) On June 5, 2018, the Defendants filed their Memorandum Opposing Motion to Amend Answer. (R. 418-435) On January 7,

2019, Panel Chair Cooke granted Morgan's motion without prejudice to the Defendants' objections to the amendment based on both the Court's and Panel's lack of subject matter jurisdiction and the three-year statute of limitations bar. (R. pp. 10-11)

POINTS OF LAW AND FACT OVERLOOKED
OR MISAPPREHEND BY THIS COURT

1. THIS COURT MISAPPREHENDED BOTH THE FACTS OF THIS CASE AND SOUTH CAROLINA LAW WHEN IT HELD THAT "BOTH THE CIRCUIT COURT AND ARBITRATION PANEL HAD SUBJECT MATTER JURISDICTION OVER THIS MATTER"

A. FACTS

On January 26, 2012, Morgan filed his 2012 Original Complaint (R. pp 139-163). He brought this suit as a derivative action on behalf of 150 Bee Street LLC. In his complaint, Morgan did not name the Company as plaintiff or defendant.

Morgan did nothing to correct his failure to name the Company as a party until six (6) years later, when he served his motion on February 26, 2018 (Morgan "**2018 Motion to Amend**") (R. pp. 381-417) seeking to amend his 2012 Original Complaint to add the Company as a party. Over Appellants' objection, the Panel chair allowed the amendment (Order of Arbitration Chair Cooke 1/7/19) (R. pp. 10-11)

B. LAW

The Company was a necessary and "indispensable" party to Morgan's derivative action because any right of recovery belonged to the Company. Without the Company as a party, if the Defendants prevailed, the verdict would not be *res judicata* as to the Company. See, e.g., *Koster v. American Lumbermens Mut. Cas. Co*., 330 U.S. 518 (1947); *Gabriel v. Preble*, 396 F.3d 10 (1st

Cir. 2005); *Agostino v. Hicks*, 845 A.2d 1110 (Del. Ch. 2004); *Schuler v. Feder*, 184 N.Y.S.2d 933 (Supp. 1959).

The failure of Morgan to make the Company a party in his 2012 Original Complaint was not a mere defect of parties but left Morgan without a cause of action and the Panel and courts without subject matter jurisdiction. See, e.g., *Smyly v. Smith*, 216 Ga. 529, 118 S.E.2d 188 (1961); *Daniels v. Vann*, 396 So.2d 723 (D.Ct. App. Fl. 4th Dist.) (1981); *Fitzpatrick v. Shay*, 314 Pa. Super 450, 461 A.2d 243 (1983); *In re McCoy*, 157 B.R. 705 (Bankr. M.D. Fla. 1993). Morgan has never cited any case contrary to these principles of law. To cure this otherwise fatal mistake, Morgan asserts two arguments, which this court has accepted because of its misapprehension of both the facts of this case and applicable South Carolina law.

I. First, this Court has agreed with Morgan's argument that pursuant to Rule 19, SCRCP, the arbitration panel properly permitted the addition of the Company as a party. This ruling misapprehends both the facts of this case and applicable South Carolina law.

This court has ignored the fact that Morgan did nothing to add the Company as a party until six (6) years after he filed his 2012 Original Complaint.

Morgan's untimely effort to join the Company well beyond the applicable three (3) year statute of limitations does not cure this fatal defect as suggested by this Court. It was entirely improper for the Panel to permit Morgan under Rule 19, SCRCP, or for any other reason to join the Company as an indispensable party well beyond the applicable three (3) year statute of limitations. See *Gillman v. City of Beaufort*, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006).

This Court suggested that attempted joinder of a new party, the Company, relates back to the original filing of Morgan's 2012 Original Complaint. Well-established case law rejects the Court's position.

As the plaintiff in the *McCoy* case, *supra*, unsuccessfully attempted, Morgan claimed in 2019 that the addition of 150 Bee Street, LLC as a party should relate back to Morgan's 2012 Original Complaint so as to avoid the three (3) year statute of limitations. This position likewise misapprehends the clear legal principle that the addition of a party differs from a substitution or change of a party governed by Rule 15(c), SCRCP. Substitutions relate back; additions do not. See *Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). And with the 2012 Original Complaint effectively a nullity, Morgan had no pleading to amend and the Panel had no jurisdiction to consider it.

II. Second, this Court has agreed with Morgan's argument that the Panel had subject matter jurisdiction because of the consent order by which the parties agreed to arbitrate all claims relating to the subject matter of the case and agreed to submit themselves to the jurisdiction of the court and the arbitration Panel. Even if this Court accepts Morgan's argument (which Petitioners argue it should not), it is undeniable that 150 Bee Street, LLC never agreed to submit itself to the Panel's and the Court's jurisdiction. To suggest otherwise is a manifest disregard of the law.

Further, this Court has misapprehended the South Carolina "black letter law" dealing with waiver of objections to subject matter jurisdiction. Despite this Court's ruling to the contrary, subject matter jurisdiction cannot be waived, even with the consent of the parties. *Hunter v. Boyd*, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943); *Bluffton Town Council Election* v. *Fulgham*, 385 S.C. 632, 637, 686 S.E.2d 683, 685 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties and should be taken notice of by this Court.") And without subject matter jurisdiction, anything that a court does is void *ab initio.* See, e.g. *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) (A judgment without subject-matter jurisdiction is void.")

This Court, having misapprehended the facts of this case and law dealing with both 1) Morgan's Rule 19 amendment to add the Company as a party and 2) the of lack of subject matter jurisdiction for either reason should hold that neither the circuit court nor the arbitration Panel had subject matter jurisdiction over this case, thereby voiding the judgment.

2. THIS COURT MISAPPREHENDED THE FACTS OF THIS CASE AND SOUTH CAROLINA LAW (AND THE ARBITRATION PANEL MANIFESTLY DISREGARDED APPLICABLE SOUTH CAROLINA LAW) WHEN THIS COURT HELD THAT MORGAN'S CLAIM WAS NOT BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS.

FACTS AND LAW

In ruling as it did on the issue of when the statute of limitations began to run, this Court has made a "straw man" argument by asserting that because the parties presented "conflicting evidence," the issue became a "question of fact for the arbitration panel to decide," with its determination conclusive, which must be upheld on appeal. Morgan's own language in his July and August, 2008, emails is undeniable and not debatable as an issue of fact. To ignore the legal effect of these emails would be to manifestly disregard the law.

The argument accepted by this Court is a straw man argument because this Court has decided to respond to an argument of its choosing and not the one actually presented. See *State v. Bagley*, 2022 WL 496800 (Ct.App. Ka. 2/18/22, 503 P.3d 1082).

In explanation, Appellants assert there was no "conflicting evidence" in what they presented on this issue. All of the following facts are incontrovertible:

1. May, 2008 – Morgan involved his accountant, Rich Merg, to begin investigating the Company's financial records.
2. July 6 2008 – Morgan emailed all other Company members:

"I am turning all my correspondence over to my lawyer and accountants. Stewart [sic., "Stuart"], you have taken too much money from us. There is no way we have spent $450,000 on travel expenses. I am tired of all your theft and bullshit … I am going to sue your ass and get our money back." (R. p. 951)

3. August 23. 2008 – Morgan emailed his brother-in-law, Company Managing Member Neal Baker:

   "The only reason I don't plan to sue John and Stuart is that I don't want to involve you in the middle of this." (R. p. 959-960)

4. November 2, 2022 – In the trial of the case, when Morgan was questioned about his not filing suit until January 26, 2012, he testified:

   "I wanted to see the expenses, what they were, a backup of it. … I was trying to get the backup to see what these construction travel expenses were, and they wouldn't give them to me." (Tr. p. 584; R. p. 0855)

Appellants accept all of this evidence as true. This evidence does not present a conflict and thus does not present a "question of fact" for either the arbitration Panel or the Court to decide.

It is instructive that in ruling against the Appellants on this issue, this Court in its opinion cited in support of its opinion *Moore v. Benson*, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

However, the *Moore* decision instead demonstrates clearly not only that this Court misapprehended South Carolina law governing the statute of limitations issue but also that the Panel manifestly disregarded South Carolina law. In *Moore*, the respondent, an elderly father, sued his daughter and son-in-law for breach of fiduciary duty and fraud in connection with the transfer of the father's retirement funds and real property. The respondent's daughter and son-in-law asserted that because the property transfer was made in March, 2001, and the father did not

file suit until October, 2006, the master-in-equity erred in denying their motion to dismiss based on the applicable three-year statue of limitations. The Court of Appeals considered the facts before it and found the master was correct in his finding that the statute of limitations began to run when the respondent father first had "**suspicions** that something was amiss." (Emphasis added)

In reaching this conclusion, the Court of Appeals wrote:

"The discovery rule applies to this action. … The date on which discovery of the cause of action should have been made is an **objective question**. … In other words, **whether the particular plaintiff actually knew he had a claim is not the test**. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that **some right** of his has been invaded, or that **some claim** against another party might exist." (Citations omitted) Id. at S.E.2d 277. (Emphasis added)

The facts of Morgan's conduct set forth above and accepted as true in full by the Appellants show more than a mere suspicion on his part of alleged misconduct by the Appellants in July, 2008. The Panel and this Court manifestly disregarded Morgan's own undeniable language when he unambiguously threatened to file a lawsuit against the Respondents in 2008.

In *Hine v. McCrory*, 2023 WL 3994467 (Unpublished Opinion, S.C. Ct. Ap. 6/14/25) this Court recently confronted a similar straw man argument of the appellants that "conflicting evidence" as to when the statute of limitations began to run presented questions of fact for a jury rather than dismissal of their case by summary judgment.

This Court disagreed:

"The undisputed evidence in the record demonstrates that when Appellants learned there was [a relatively minor amount of] unrepaired termite damage on the Property in 2012, they promptly notified Respondents of their claim in the May 14, 2012 letter. Although Appellants did

not realize then the [extensive] magnitude of problem until 2018, we agree with the circuit court that the 2012 discovery triggered the running of the statute of limitations."

"… [T]here is no conflicting evidence here as to when Appellants first discovered unrepaired termite damage at the Property."

"[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial." Similarly, the fact that Morgan did not comprehend the full extent of his claim for damages until long after 2008 when he had threatened suit is likewise immaterial.

This Court in *Hine* also considered the Appellants argument that the court should set aside the statute of limitations "as a matter of equity," an issue also raised by Morgan.

This Court in *Hine* noted first that the party claiming that the statute of limitations should be tolled bears the burden of establishing **sufficient facts** to justify its use.

The Appellants in *Hine* argued that the Respondents, who sold them the house, "covered up" more extreme termite damage and that the only way the Appellants could have discovered the fraudulent conduct would have been through destructive testing. This Court found that the sellers' arguably deceptive acts were not the type of "extraordinary event" that would justify equitable tolling.

Morgan raised this equitable defense as well as equitable estoppel in his briefs. Here again, this Court raised the straw man argument of "conflicting evidence" in this case which presented questions of fact decided by the Panel.

"The touchstone of equitable estoppel is that some conduct or representation by the defendant has induced the plaintiff to delay filing suit… An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct

that suggests a lawsuit is not necessary…" *Hedgepath v. American Tel & Tel. Co.*, 348 S.C. 340, 359, 559 S.E.2d 327, 338 (Ct. App. 2001).

In this case, the parties took several thousand pages of deposition testimony, collectively produced 300,000+ documents, and presented evidence to the panel for a week of trial.

In all of its orders, there is no mention by the Panel of the application of the doctrines of equitable tolling or equitable estoppel.

More importantly, in the entire record, there is no evidence that justifies or supports the application of either equitable doctrine, nor did Morgan offer any such evidence in any record in this case and/or appeal.

CONCLUSION

The Panel manifestly disregarded the law and facts in this case dealing with subject matter jurisdiction in derivative actions and the three year statute of limitations.

Likewise, this Court ignored the undeniable facts in this case and South Carolina law governing these two issues.

On either or both of these grounds, this Court should reverse its opinion and dismiss the Panel's award.

WOMBLE BOND DICKINSON (US) LLP

/s/ Henry E. Grimball______________
Henry E. Grim ball, S.C. Bar No. 2313
Morris A. Ellison, S.C. Bar No. 1881
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400
Attorneys for Appellants
[Except 150 Bee Street, LLC]

April 4, 2025

RECEIVED
Apr 04 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No, 2012-CP-10-00580

Thomas H. Morgan..Respondent,

v.

John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, Lauralis Management, Inc., A Texas Corporation, and 150 Bee Street, LLC, A South Carolina Limited Liability Company, Defendants,

Of which John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group Il, LLC, A Texas Limited Liability Company, and Lauralis Management, Inc., A Texas Corporation are the Appellants.

PROOF OF SERVICE

APPELLANTS' PETITION FOR REHEARING

I do hereby certify that on April 4, 2025, a copy of the **Petition for Rehearing** was emailed to and also deposited with the United States Postal Service, as first class mail, in an envelope addressed to:

W. Andrew Gowder, Jr.
AUSTEN & GOWDER, LLC
1629 Meeting Street Rd., Suite A
Charleston, SC 29405

Michael T.Rose

MIKE ROSE LAW FIRM, PC
406 Central Avenue
Summerville, SC 294831

WOMBLE BOND DICKINSON (US) LLP

/s/ Henry E. Grimball
Henry E. Grim ball, S.C. Bar No. 2313
Morris A. Ellison, S.C. Bar No. 1881
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400
Attorneys for Appellants
[Except 150 Bee Street, LLC]

April 4, 2025